(9)

No. 03-218

In the Supreme Court of the United States

JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Child Online Protection Act violates the First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are set forth in the petition for a writ of certiorari.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 322 F.3d 240. An earlier opinion of the court of appeals (Pet. App. 67a-105a) is reported at 217 F.3d 162. The opinion of the district court (Pet. App. 106a-166a) is reported at 31 F. Supp. 2d 473. The opinion of the district court granting a temporary restraining order (Pet. App. 167a-180a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2003. A petition for rehearing was denied on May 13, 2003 (Pet. App. 181a-182a). The petition for a writ of certiorari was filed on August 11, 2003, and was granted on October 14, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech, or of the press." The pertinent provisions of the Child Online Protection Act are reprinted in an appendix to the certiorari petition. Pet. App. 183a-191a.

STATEMENT

1. a. This case involves the scope of Congress's power to protect minors from the harmful effects of sexually explicit material on the Internet. Congress first sought to address that serious problem through the enactment of Section 502 of the Communications Decency Act of 1996 (CDA). See Pub. L. No. 104-104, Tit. V, § 502, 110 Stat. 133. The CDA prohibited the knowing transmission of "indecent" messages over the Internet to persons under the age of 18, 47 U.S.C. 223(b), as well as the display of "patently offensive" sexually explicit messages in a manner available to those under 18 years of age. 47 U.S.C. 223(d). In *Reno* v. *ACLU*, 521 U.S. 844 (1997), the Court held that the CDA's regulation of "indecent" and "patently offensive" speech violated the First Amendment. The Court reaffirmed that the government has a "'compelling interest in protecting the physical and psychological well-being of minors which extend[s] to shielding them from indecent messages that are not obscene by adult standards." *Id.* at 869 (quoting *Sable Communication of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989)). It concluded, however, that the CDA was not narrowly tailored to further that compelling interest. *Id.* at 879.

b. Congress reexamined the problem of minors' access to sexually explicit material on the Internet in

light of this Court's decision in *Reno* v. *ACLU*. See *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce*, 105th Cong., 2d Sess. (1998); S. Rep. No. 225, 105th Cong., 2d Sess. 8 (1998). Following legislative hearings, *ibid*, Congress enacted, and the President signed into law, the Child Online Protection Act (COPA), Pub. L. No. 105-277, Div. C, Tit. XIV, §§ 1401-1406, 112 Stat. 2681-736 to 2681-741 (47 U.S.C. 231 note).

COPA authorizes the imposition of criminal and civil penalties on any person who "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. 231(a)(1). A person communicates "for commercial purposes" only if he "is engaged in the business of making such communications," 47 U.S.C. 231(e)(2)(A), and a person is engaged in the business of making such communications only if he "devotes time, attention, or labor" to making harmful-to-minors communications "as a regular course of [his] trade or business, with the objective of earning a profit as a result of such activities." 47 U.S.C. 231(e)(2)(B).

COPA defines "material that is harmful to minors" as "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind" that is "obscene" or that

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is

designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. 231(e)(6).

COPA's definition of non-obscene material that is "harmful to minors" parallels the three-part "harmful to minors" standard this Court approved in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), except that it has been modified to take into account the greater flexibility permitted by *Miller* v. *California*, 413 U.S. 15 (1973). Compare 47 U.S.C. 231(e)(6), with *Ginsberg*, 390 U.S. at 631-633, and *Miller*, 413 U.S. at 24; see *Ashcroft* v. *ACLU*, 535 U.S. 564, 570 (2002); H.R. Rep. No. 775, 105th Cong., 2d Sess. 13, 27-28 (1998). COPA's definition also tracks the standard used in state laws that prohibit the public display of magazines or other materials that are harmful to minors and that require that such materials be placed in a blinder rack, in a sealed opaque wrapper, or behind the counter. *Id.* at 13.

COPA provides "an affirmative defense to prosecution" if a person, "in good faith, has restricted access by minors to material that is harmful to minors." 47 U.S.C. 231(c)(1). A person qualifies for that affirmative defense by (A) "requiring use of a credit card, debit account, adult access code, or adult personal identification number," (B) "accepting a digital certificate that verifies age," or (C) taking "any other reasonable measures that are feasible under available technology." 47 U.S.C. 231(c)(1).

c. In crafting COPA, Congress addressed the specific concerns raised by this Court when it invalidated the CDA. H.R. Rep. No. 775, *supra*, at 12; S. Rep. No. 225, *supra*, at 2; see *Ashcroft* v. *ACLU*, 535 U.S. at 569; *id.* at 578 (plurality opinion of Thomas, J.); *id.* at 591 (Kennedy, J., concurring in the judgment). First, the CDA applied to communications through e-mail, newsgroups, and chat rooms, and age screening was not technologically feasible for those forms of communication. *Reno* v. *ACLU*, 521 U.S. at 851, 876-877. In contrast, COPA applies only to material posted on the World Wide Web, 47 U.S.C. 231(a)(1), where age screening is both technologically feasible and affordable. H.R. Rep. No. 775, *supra*, at 13-14.

Second, the CDA prohibited the display or transmittal of materials that were "indecent" or "patently offensive," without defining those terms, and the CDA did not indicate whether the "indecent" and "patently offensive" determinations "should be made with respect to minors or the population as a whole." *Reno* v. *ACLU*, 521 U.S. at 871 & n.37, 873, 877. COPA, by contrast, responds to those concerns by identifying the particular types of sexually explicit depictions, descriptions, or representations that may be considered patently offensive, and is limited to material that is "patently offensive with respect to minors." 47 U.S.C. 231(e)(6)(B).

Third, because the CDA did not require that covered material appeal to the prurient interest or lack serious value for minors, it covered vast amounts of non-pornographic material having serious value. *Reno* v. *ACLU*, 521 U.S. at 873, 877-878. In contrast, COPA addresses

that problem by imposing its requirements only with respect to material that is designed to appeal to the prurient interest of minors and that, "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6)(A) and (C).

Fourth, the CDA applied to noncommercial entities and to individuals posting messages on their own computers. It therefore included categories of speakers who might not be able to afford age screening. *Reno* v. *ACLU*, 521 U.S. at 856, 865, 877. COPA, on the other hand, applies only to persons who seek to profit from placing harmful-to-minors material on the Web as a regular course of their business. 47 U.S.C. 231(a)(1) and (e)(2). Such persons can afford the costs of compliance. H.R. Rep. No. 775, *supra*, at 15; S. Rep. No. 225, *supra*, at 6.

Finally, COPA reduces the age of minority from under age 18 to under age 17. It also makes clear that, unlike the CDA, parents do not violate COPA when they permit their minor children to use the family computer to view material covered by the Act. See 47 U.S.C. 231(e)(7); H.R. Rep. No. 775, *supra*, at 15; S. Rep. No. 225, *supra*, at 6; *Reno* v. *ACLU*, 521 U.S. at 865-866, 878.

d. Congress made legislative findings that explain the basis for COPA. It found that the "widespread availability of the Internet" continues to "present[] opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control." 47 U.S.C. 231 note (Finding 1). Congress further determined that "the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest." 47 U.S.C. 231 note (Finding 2). Congress noted that "the industry has

developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation." 47 U.S.C. 231 note (Finding 3). It found, however, that "such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web." *Ibid.* Congress concluded that "a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest." 47 U.S.C. 231 note (Finding 4).

The House Report accompanying COPA further documents the serious problem that Congress sought to address. By 1998, the number of minors using the Internet had grown to 16 million. H.R. Rep. No. 775, *supra*, at 9. At the same time, the number of pornography Web sites had grown to 28,000. *Id.* at 7. Those sites offer "teasers"—free pornographic images designed to entice users to pay a fee to explore the whole site. *Id.* at 10. Because Web software is easy to use, "minors who can read and type are capable of conducting Web searches as easily as operating a television remote." *Id.* at 9-10. As a result, pornographic material on the Internet is "widely accessible" to minors. *Id.* at 9. While many minors deliberately search for pornographic Web sites, others accidentally stumble upon them. *Id.* at 10. Many pornographic sites use "copycat" Web addresses to take advantage of innocent mistakes. For example minors would find hard-core pornography by mistyping www.whitehouse.com rather than www.whitehouse.gov. *Ibid.* Searches using common terms such as toys, girls, boys, bambi, and doggy all lead to pornographic sites. *Ibid.* Most pornographic Web sites either provide no warning that their sites contain

pornography or provide a warning on the very same Web page that displays pornographic teasers. *Ibid.*

2. a. Before COPA became effective, a number of entities and individuals who maintain or seek access to Web sites filed suit in the United States District Court for the Eastern District of Pennsylvania, seeking to invalidate COPA. Respondents alleged that COPA violates the First and Fifth Amendments to the Constitution, and they sought to enjoin its enforcement. Pet. App. 114a-115a. The district court entered a preliminary injunction preventing enforcement of the Act, reasoning that COPA likely violates the First Amendment. *Id.* at 164a- 166a.

Many of the district court's findings support COPA's constitutionality. The district court found that pornographic material is widely available on the Web and that minors can readily obtain access to it. Pet. App. 156a. The court also found that readily available adult identification systems enable Web site operators to prevent minors from obtaining access to harmful materials while still offering such material to adults. The court found, for example, that Web operators can place harmful material behind screens that allow access to the material only when the user provides a valid credit card number. *Id.* at 138a-140a. The court found that a Web operator could establish a credit card verification system for $300 and could perform a verification check of each individual viewer for $.15 to $.25 per year. *Ibid.*

The court also noted that one company, Adult Check, provides (at no cost to the Web business) a script that can be placed anywhere the Web operator wishes to prevent access by minors. Pet. App. 141a. An adult user who comes across such a screen may click on a link to the Adult Check site and immediately purchase an

adult personal identification (adult ID) for $16.95, return to the original site, and use the ID to obtain access to the site. *Id.* at 141a-142a. The court cited testimony that approximately three million people possess a valid Adult Check ID, and 46,000 Web sites accept them. *Id.* at 142a. The court also found that Web operators can segregate the harmful material from their sites behind age verification screens, leaving other material on the site to be viewed by all users. *Id.* at 138a, 143a.

The district court nonetheless determined that respondents were likely to show that COPA imposes an impermissible burden on speech that is protected for adults. Pet. App. 156a. The court found that respondents were likely to establish at trial that the placement of adult screens in front of material that is harmful to minors "may deter" users from seeking access to such materials, that the loss of users "may affect" Web businesses' economic ability to provide such communications, and that Web site operators and content providers "may feel" an economic disincentive to display material that is or may be considered harmful to minors. *Id.* at 155a-156a.

The district court also concluded that the voluntary use of blocking software might be "at least as successful as COPA" in restricting minors' access to harmful material without imposing the same burden on constitutionally protected speech. Pet. App. 160a. The court acknowledged that software blocks access to some sites that contain no harmful material, and that it permits access to some sites that contain such material. *Id.* at 148a, 160a. The court also noted that "[i]t is possible that a computer-savvy minor with some patience would be able to defeat the blocking device," and that "a minor's access to the Web is not restricted if [that

minor] accesses the Web from an unblocked computer." *Id.* at 148a. The court found it more significant, however, that software can block material on foreign Web sites and material outside the Web, and that some minors may be able to obtain access to credit cards and adult IDs and thereby obtain access to harmful-to-minor material despite the screening mechanisms provided for in COPA's affirmative defenses. *Id.* at 148a, 159a.

b. The court of appeals affirmed on a different ground. Pet. App. 67a-105a. It held that COPA's reliance on "community standards" to identify material that is harmful to minors renders COPA facially unconstitutional, because it effectively requires Web businesses to comply with the community standards of the least tolerant community. *Id.* at 69a.

3. This Court vacated and remanded for further proceedings. *Ashcroft* v. *ACLU*, 535 U.S. 564 (2002). In a judgment supported by several opinions, the Court held that "COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." *Id.* at 585.

In a plurality opinion, Justice Thomas, joined by the Chief Justice and Justice Scalia, concluded that "[b]ecause Congress has narrowed the range of content restricted by COPA in a manner analogous to [the] definition of obscenity" set forth in *Miller* v. *California*, 413 U.S. 15 (1973), "any variance caused by the statute's reliance on community standards is not substantial enough to violate the First Amendment." 535 U.S. at 584-585.

Justice O'Connor concurred in part and concurred in the judgment. 535 U.S. at 586-589. She agreed with the plurality that "even under local community standards, the variation between the most and least restrictive communities is not so great with respect to the narrow category of speech covered by COPA as to, alone, render the statute substantially overbroad." *Id.* at 586. She nonetheless concluded that COPA should be interpreted to incorporate a "national standard." *Id.* at 587.

Justice Breyer also concurred in part and concurred in the judgment. 535 U.S. at 589-591. He concluded that Congress intended the term "community standards" to refer to a national standard, *id.* at 590, and that any regional variations in the application of that standard "are not, from the perspective of the First Amendment, problematic." *Id.* at 591.

Justice Kennedy, joined by Justice Souter and Justice Ginsburg, concurred in the judgment. 535 U.S. at 591-602. They concluded that it cannot be known "whether variation in community standards renders the Act substantially overbroad without first assessing the extent of the speech covered and the variations in community standards with respect to that speech." *Id.* at 597.[1]

4. On remand, the court of appeals once again affirmed the district court's grant of a preliminary injunction. Pet. App. 1a-66a.

a. Based on several considerations, the court held that COPA does not withstand scrutiny under the First Amendment. Pet. App. 19a-49a. The court first held that COPA's requirement that material be considered "as a whole" to determine whether it appeals to the

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[1] Justice Stevens dissented. 535 U.S. at 602-612. He concluded that COPA's use of community standards to identify material harmful to minors renders the statute facially unconstitutional. *Ibid.*

prurient interest is not narrowly tailored to serve the government's compelling interest in protecting minors from the covered material. The court noted that, under this Court's obscenity decisions, the First Amendment requires material to be considered "in context" in deciding whether it appeals to the prurient interest. *Id.* at 21a-22a. The court interpreted COPA to preclude such a contextual assessment. The court reasoned that, because COPA describes harmful material as "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind," 47 U.S.C. 231(e)(6), COPA's "as a whole" requirement actually "mandates evaluation of an exhibit on the Internet in isolation, rather than in context." Pet. App. 22a.

The court next concluded that use of the term "minors" in the harmful-to-minors definition is not narrowly drawn to achieve the statute's purpose. Pet. App. 27a-28a. The court reasoned that, because COPA defines "minor" as "any person under 17 years of age," 47 U.S.C. 231(e)(7), Web businesses cannot know which minors should be considered in deciding whether material appeals to the prurient interest, is patently offensive, and lacks serious value. Pet. App. 24a-25a. The court rejected the government's argument that the question under COPA is whether material appeals to the prurient interest of, is patently offensive with respect to, and lacks serious value for, older minors. *Ibid.* In doing so, the court acknowledged that, before COPA's enactment, state display laws with similar language had been construed to incorporate that standard or a similar one, *id.* at 25a-26a n.16, but it concluded that Congress did not intend to incorporate that standard into COPA. *Id.* at 25a-27a. The court further concluded that even if COPA incorporates the

normal older adolescent standard, it still would not be "tailored narrowly enough to satisfy the First Amendment's requirements." *Id.* at 28a.

The court of appeals also held that COPA's limitation to communications made "for commercial purposes," 47 U.S.C. 231(a)(1), does not sufficiently narrow the statute's reach. Pet. App. 28a. The court criticized COPA's "commercial purposes" limitation on the ground that it includes businesses that post harmful-to-minors material even if they do not post such material "as the principal part of their business" and even if they seek to derive profit from the material through the sale of "advertising space" on the Web site rather than through the sale of the material itself. *Id.* at 29a. The court rejected the government's reliance on COPA's definition of commercial purposes, which limits the reach of COPA to businesses that seek to profit from the distribution of harmful-to-minors material "as a regular course" of their business. 47 U.S.C. 231(e)(2)(A) and (B). The court stated that the "regular course" requirement does not "place any limitations on the amount, or the proportion, of a Web publisher's posted content that constitutes [harmful] material." Pet. App. 31a.

The court of appeals next held that while COPA affords an affirmative defense to Web site operators that use credit cards or adult IDs to prevent minors from obtaining access to harmful material, those methods of compliance unconstitutionally burden adult access to protected material. Pet. App. 32a-38a. The court reasoned that "COPA will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is

sensitive or controversial." *Id.* at 35a. The court also regarded COPA's affirmative defenses as deficient because, while they furnish protection against conviction, they do not provide Web site operators "with assurances of freedom from prosecution." *Id.* at 36a-37a.

In addition to finding COPA not to be narrowly tailored, the court determined that COPA does not employ the least restrictive means to further the compelling interest in protecting minors. Pet. App. 38a-48a. For the reasons given by the district court, the court of appeals concluded that filtering software "may be substantially less restrictive than COPA in achieving COPA's objective of preventing a minor's access to harmful material." *Id.* at 47a. The court concluded that "[t]he existence of less restrictive alternatives renders COPA unconstitutional under strict scrutiny." *Id.* at 48a.

b. Relying on the same considerations that led it to conclude COPA is not sufficiently tailored to satisfy strict scrutiny, the court of appeals held that COPA is substantially overbroad. Pet. App. 49a- 60a. The court further concluded that COPA's reliance on community standards "exacerbates" those "constitutional problems." *Id.* at 58a. And, relying on the same considerations that led it to conclude that COPA's definition of "minor" is not narrowly tailored, the court invalidated that definition as unconstitutionally vague. *Id.* at 55a n.37.

Finally, the court concluded that it could not give COPA a narrowing construction that would render it constitutional. Pet. App. 59a. The court therefore affirmed the district court's preliminary injunction against any enforcement of COPA. *Id.* at 60a.

SUMMARY OF ARGUMENT

I. The Child Online Protection Act is narrowly tailored to further the government's compelling interest in shielding minors from material that is harmful to them. It therefore does not violate the First Amendment.

A. There is a compelling governmental interest in protecting minors from the effects of material that is not obscene by adult standards, but that is nonetheless harmful to minors. The Web poses a serious threat to that compelling interest. Thousands of Web businesses display numerous free pornographic depictions that are harmful to minors, and that material is readily accessible to minors of all ages.

B. COPA is narrowly tailored to address that serious problem. COPA specifically responds to the narrow tailoring concerns that led this Court to invalidate the CDA. COPA applies only to material on the World Wide Web. It applies only to material that appeals to the prurient interest of minors, is patently offensive with respect to minors, and lacks serious value for minors. It defines with particularity the kinds of depictions that may be deemed patently offensive. And it applies only to Web operators that regularly distribute harmful material in order to generate a profit.

C. COPA also shares the essential characteristics of state laws that prohibit the public display of harmful material in places where minors may be present. Like those laws, COPA shields minors from the effects of material that is harmful to them, without imposing an undue burden on adult access to that material. Indeed, COPA's principal effect is to require Web businesses that already display their sale material behind age

verification screens to put their free material behind those screens as well.

II. The court of appeals' conclusion that COPA is not narrowly tailored is based on a misinterpretation of COPA's scope and a misapplication of First Amendment principles.

A. The court of appeals erred in holding that COPA requires material to be viewed in isolation. COPA directs communications to be viewed "as a whole," and that direction means that communications must be viewed in the context in which they are presented. In general, that context would include the entire Web site.

B. The court of appeals further erred in holding that Web businesses cannot know the age of the minors for whom material must have serious value. Congress expressly modeled COPA on state harmful-to-minor laws, and those laws had been construed to apply only to material that lacks serious value for the oldest group of protected minors. Thus, material lacks serious value for minors under COPA when it lacks serious value for normal 16-year olds.

C. The court of appeals' criticisms of the commercial purposes limitation are misguided. If, as suggested by the court of appeals, Congress had limited COPA to businesses that are primarily devoted to harmful material, or to businesses that derive profits from sales rather than advertising, serious loopholes in COPA's protection would have been created. Under such a statute, businesses that market themselves as pornography vendors would have escaped regulation as long as the sale of pornography were not the principal part of their business. Similarly, Web businesses that post nothing but pornography and advertisements on the their sites would not be covered as long as they derived profits from advertising revenue rather than from the

sale of the material itself. Congress was not required to compromise so seriously its goal of protecting minors from harmful material.

D. Nor do COPA's affirmative defenses place an undue burden on adult access to harmful material. Adults need only use an adult ID or a credit card to obtain access to such material. Millions of adults already use adult Ids and credit cards on the Web. And proof of age is a standard way to obtain access to material that is harmful to minors in nightclubs, adult book stores, and movie theaters.

E. The court of appeals also erred in holding that filtering software is a sufficient alternative to COPA's mandatory screening requirement. Filtering software is not nearly as effective as COPA's screening requirement in shielding minors from commercial domestic pornography on the Web. Filtering software is voluntary, while COPA's screening requirement is mandatory. Filtering software also blocks some sites that are not harmful; it fails to block some sites that are harmful; it can be expensive for parents to purchase; and it quickly becomes outdated. Congress also did not view mandatory screening and blocking software as an either or choice. It mandated screening and encouraged the use of blocking software as well. That combined approach is far more effective than the use of voluntary blocking software alone.

III. COPA is also not substantially overbroad. The court of appeals identified only three valuable Web communications that it believed were arguably covered by COPA, and under the correct interpretation of COPA, none of those examples is covered.

ARGUMENT

THE CHILD ONLINE PROTECTION ACT IS CONSISTENT WITH THE FIRST AMENDMENT

I. COPA IS NARROWLY TAILORED TO FURTHER THE GOVERNMENT'S COMPELLING INTEREST IN PROTECTING MINORS FROM HARMFUL MATERIAL ON THE WORLD WIDE WEB

The Child Online Protection Act regulates expression that is not constitutionally protected for minors, but that is constitutionally protected for adults. COPA reasonably regulates such expression on the basis of its content, in order to achieve its purpose of protecting minors. But because it regulates on the basis of content, COPA "must be narrowly tailored to promote a compelling government interest" in order to be constitutional under the First Amendment. *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). COPA satisfies that standard. The government has a compelling interest in shielding minors from the harmful effects of pornography on the Web, and COPA is narrowly tailored to achieve that interest.

A. The Government Has A Compelling Interest In Shielding Minors From Harmful Material On The Web

The Court has repeatedly held that the government has a compelling interest in protecting minors from pornographic material that is not obscene by adult standards, but that is nonetheless harmful to minors. *Reno* v. *ACLU*, 521 U.S. 844, 864-865 (1997); *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989); *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968). That compelling interest has two components. First, the government has an interest in aiding parents who wish to protect their children from the harmful effects

of pornographic material. *Ibid.* Second, the government has an independent interest in the well being of the Nation's minors. *Id.* at 640; *Reno* v. *ACLU*, 521 U.S. at 865.

The pornography on the Web poses a serious threat to those compelling government interests. There are thousands of pornographic sites on the Web that offer "teasers"—free pornographic images designed to entice users to pay a fee to explore the whole site. H.R. Rep. No. 775, *supra*, at 7, 10. Minors today can search the Web as easily as they can change television channels. *Id.* at 9-10. Thus, in the seclusion of their homes or those of friends, unsupervised minors can, with the click of a mouse, visit one pornographic site after another, and view and then print one set of pornographic teasers after another. There is also a serious risk that minors will be inadvertently exposed to pornographic material. *Id.* at 9. Pornography businesses use copycat addresses, such as "Whitehouse. com," to lure unsuspecting viewers to their sites, and common search terms such as "girls," "toys," and "bambi" lead to pornographic sites. *Ibid.*

In the years since COPA has been enjoined, the problem has grown worse. The number of minors who use the Internet has increased dramatically. As of 2001, more than two-thirds of the minors between the ages of nine and 17 were using the Internet, and more than one-quarter of the minors between the ages of three and eight were doing so. National Telecommunications and Info. Admin., *A Nation Online: How Americans are Expanding Their Use of the Internet*, Tables 2-2 to 2-3 (Feb. 2002) <http://www.ntia.doc.gov/ntiahome/dn/>. At the same time, pornographic Web businesses have developed more sophisticated techniques for luring viewers to their sites: They send

unsolicited e-mail (known as "spam"), pay search engine companies for more prominent placement, acquire expired domain names that have a reputation for generating traffic, and pay other Web sites to obtain their exit traffic (known as "mouse trapping"). National Research Council, *Youth, Pornography, and the Internet* 74 (Dick Thornburgh & Herbert S. Lin eds., 2002). The results are disturbing. Based on data compiled in a report commissioned by Congress, approximately 70 million different individuals visit pornographic Web sites each week, and 16% of those visitors —approximately 11 million—are under the age of 18. *Id.* at 72, 78. Surveys show that 25% of minors between the ages of 10 and 17 who regularly use the Internet inadvertently viewed pornography in the prior year. *Id.* at 132-133. Of minors between the ages of 15 and 17, 70% have viewed pornography inadvertently. *Id.* at 133. The government has a compelling interest in addressing those serious problems.

B. COPA Satisfies *Reno* v. *ACLU*'s Narrow Tailoring Requirements

Based on guidance this Court provided in *Reno* v. *ACLU*, *supra*, Congress narrowly tailored COPA to further the government's compelling interest in shielding minors from pornography on the Web. Thus, unlike the CDA, COPA satisfies the First Amendment's narrow-tailoring requirement.

In holding the CDA unconstitutional, the Court identified several flaws that together rendered the CDA insufficiently tailored to the government's compelling interest in protecting minors from harmful material. First, the CDA applied to e-mail, newsgroups, and chat rooms, where screening through the use of credit cards and adult IDs was not feasible. *Reno*

v. *ACLU*, 521 U.S. at 851, 876-877. Second, the CDA prohibited the display or transmittal of material that was "indecent" or "patently offensive," without defining those terms, and the CDA did not indicate whether the "indecent" and "patently offensive" determinations "should be made with respect to minors or the population as a whole." *Id.* at 871 & n.37, 873, 877. Third, the CDA did not require that covered material appeal to the prurient interest or lack serious value for minors, leading to the coverage of vast amounts of valuable material. *Id.* at 873, 877-878. And fourth, the CDA applied to noncommercial entities and to individuals posting messages on their own computers who might not be able to afford the cost of screening. *Id.* at 856, 865, 877.

COPA successfully addresses each of those concerns. COPA applies only to material posted on the Web, 47 U.S.C. 231(a)(1), where age screening is both technologically feasible and affordable. H.R. Rep. No. 775, *supra*, at 13-14. COPA identifies the particular types of sexually explicit depictions and descriptions that may be considered patently offensive, and it is expressly limited to material that is "patently offensive with respect to minors." 47 U.S.C. 231(e)(6)(B). COPA is narrowly limited to material that is designed to appeal to the prurient interest of minors and that, "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6)(A) and (C). And COPA applies only to persons who seek to profit from placing harmful-to-minors material on the Web as a regular course of their business. 47 U.S.C. 231(a)(1) and (e)(2). Thus, COPA cures the CDA's flaws

and satisfies *Reno* v. *ACLU*'s narrow tailoring requirements.[2]

C. COPA Shares The Characteristics Of State Harmful-To-Minor Laws That Have Been Upheld

Congress modeled COPA on state harmful-to-minor laws that have been upheld as consistent with First Amendment standards. COPA's incorporation of the essential characteristics of those valid state laws further demonstrates COPA's compliance with narrow tailoring requirements.

In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court upheld a prohibition on the sale of material that was harmful to minors, but that was not obscene as to adults. The "harmful-to-minors" statute at issue in *Ginsberg* defined harmful material in terms that closely parallel COPA, including as elements of the definition an appeal to the prurient interest of minors, patent offensiveness with respect to minors, and lack of value for minors. *Id.* at 646. With that understanding of the limited reach of the statute, the Court upheld its constitutionality. The Court explained that "[t]he legislature could properly conclude" that parents who have "primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility," *id.* at 639, and that "[t]he State also has an independent interest in the well-being of its youth," *id.* at 640.

At the time of *Ginsberg*, nearly every State had a prohibition on the sale to minors of harmful-to-minors

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[2] COPA also reduces the age of minority to under age 17 and makes clear that parents do not violate the Act when they permit their minor children to view covered material. See 47 U.S.C. 231(e)(7); H.R. Rep. No. 775, *supra*, at 15; S. Rep. No. 225, *supra*, at 6; *Reno* v. *ACLU*, 521 U.S. at 865-866, 878.

material, 390 U.S. at 647-648, and those state laws, or slight modifications of them, remain in effect today. See Gov't Br. Addendum I, *Ashcroft* v. *ACLU*, *supra* (No. 00-1293).

In addition to prohibiting the sale of harmful material to minors, many States also prohibit the public display of harmful material in places where minors are permitted. Gov't Br. Addendum II, *Ashcroft* v. *ACLU*, *supra* (No. 00-1293). This Court was presented with a facial challenge to one such law in *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988). The statute at issue in *American Booksellers* made it unlawful to display material that was "harmful to juveniles" in a manner that permitted juveniles to examine and peruse the material, and defined "harmful to juveniles" in much the same way that the statute in *Ginsberg* defined "harmful to minors." *Id.* at 386-387. In this Court, the plaintiffs argued that the display prohibition applied to as much as 25% of a typical bookseller's stock, and cited 16 examples of valuable works that allegedly were covered. *Id.* at 390. The State, by contrast, argued that the law covered only "a very few 'borderline' obscene works," and none of the plaintiffs' examples. *Id.* at 394. This Court noted that, if the State's description of the statute's coverage was accurate, it would affect "substantially" the cost of complying with the law, and the burden on adult access to speech would be "dramatically altered." *Ibid.* Accordingly, the Court certified to the Virginia Supreme Court the question whether any of the 16 books introduced as plaintiffs' exhibits were covered by the statute. *Id.* at 398.

The Virginia Supreme Court answered the certified question in *Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d 618 (1988), holding that none of 16 books fell within the ambit of the state statute. The

court construed the statute as not applying to works that "have a serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents." *Id.* at 624. The court then concluded that none of the books lacked "serious literary, artistic, political or scientific value" for that group of minors. *Ibid.* The books at issue included Alex Comfort & Jane Comfort, *The Facts of Love* (1979), and *The New Our Bodies, Ourselves* (Jane Pincus & Wendy Sanford eds., 1984). 372 S.E. 2d at 622. *The Facts of Love* contains graphic drawings of the human anatomy, and both books contain explicit, but informative, discussions of sexual acts. *Facts of Love, supra,* at 25-55; *The New Our Bodies Ourselves, supra,* at 164-197.

After the Virginia Supreme Court's decision, this Court remanded the case to the Fourth Circuit for reconsideration in light of that decision. 488 U.S. 905 (1988). On remand, the Fourth Circuit upheld the constitutionality of the statute, stating that it "agree[d] with the Virginia Supreme Court that the amendment to the statute places a minimal burden on booksellers and represents a constitutionally permissible exercise of the state's police powers." *American Booksellers Ass'n* v. *Virginia*, 882 F.2d 125, 127-128 (1989). This Court then denied certiorari. 494 U.S. 1056 (1990).

Other courts of appeals and state courts have upheld the constitutionality of state statutes that prohibit the sale or display of harmful-to-minors material in places where minors may obtain access to the material. In particular, the courts have upheld laws that prohibit: the sale of harmful material in unsupervised sidewalk vending machines (*Crawford* v. *Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117 (1997)); the display of harmful material unless placed in blinder racks that conceal harmful content (*American Booksellers* v. *Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *M.S. News Co.* v. *Casado*, 721 F.2d 1281 (10th Cir. 1983)); the display of harmful material unless the material is sealed in an opaque cover (*Upper Midwest Booksellers Ass'n* v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1986)); and the display of harmful material except in a blinder rack, sealed package, or an adults-only room (*Davis-Kidd Booksellers, Inc.* v. *McWherter*, 866 S.W.2d 520, 526-529 (Tenn. 1993)).

COPA shares the essential characteristics that make state harmful- to-minor laws constitutional. Like those laws, COPA applies only to material that appeals to the prurient interest of minors, is patently offensive with respect to minors, and lacks serious value for minors. Like state harmful-to-minor laws, COPA's obligations fall on commercial businesses that seek to profit from pornographic material and that can legitimately be expected to bear the costs of compliance. Like state harmful-to-minor laws, COPA does not ban the sale of harmful-to-minors material. Instead, it requires that businesses make good faith efforts to keep such material away from minors. Finally, like the state display laws, COPA's harmful-to-minors standard does not impose an undue burden on adult access to material that is constitutionally protected for them, but not for minors. As Congress recognized, pornographic businesses already put much of their material behind age verification screens. H.R. Rep. No. 775, *supra*, at 14. COPA's principal effect is to require commercial pornographers to place their pornographic teasers behind those screens as well. COPA's harmful-to-minors standard is therefore firmly grounded in widely accepted and constitutionally sound state harmful-to-minor laws.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT COPA IS NOT NARROWLY TAILORED

The court of appeals nonetheless held that COPA is not narrowly tailored in several respects. That holding is based on a misinterpretation of COPA's key provisions and a misapplication of established First Amendment principles. Rather than interpreting COPA to avoid constitutional problems, the court interpreted COPA to create them. And rather than faithfully applying this Court's narrow tailoring principles, the court created narrow tailoring requirements that could effectively invalidate all congressional efforts to deal with harmful-to-minor materials on the Internet.

A. COPA Requires Material To Be Viewed In Context

COPA specifies that material is not harmful to minors unless the material, "taken as a whole," appeals to the prurient interest of minors and lacks serious value for minors. 47 U.S.C. 231(e)(6). Despite COPA's directive to examine material "as a whole," the court of appeals concluded that COPA requires particular Web postings to be evaluated "in isolation, rather than in context." Pet. App. 22a. Based on that interpretation, the court of appeals held that COPA is not narrowly tailored. The court erred in interpreting COPA to require material to be viewed in isolation, rather than in context.

1. The term "as a whole" has its source in this Court's obscenity decisions, and, in that setting, carries with it the requirement that material be judged in context, rather than in isolation. In *Roth* v. *United States*, 354 U.S. 476, 490 (1957), the Court approved the following jury instruction on the "as a whole" requirement:

> The test in each case is the effect of the book, picture or publication considered as a whole. * * * The books, pictures and circulars must be judged as a whole, *in their entire context*, and you are not to consider detached or separate portions in reaching a conclusion.

Id. at 490 (emphasis added). In *Kois* v. *Wisconsin*, 408 U.S. 229, 231 (1972) (per curiam), the Court held that, under *Roth*'s "as a whole" requirement, a "reviewing court must, of necessity, look at the context of the material, as well as its content." Thus, when COPA specifies that material is covered by COPA only when, "taken as a whole," it appeals to the prurient interest of minors and lacks serious value for minors, that means that particular communications are covered by COPA, only when, *in the context in which they are presented*, the communications appeal to the prurient interest of minors and lack serious value for minors.

In concluding otherwise, the court of appeals relied on COPA's description of harmful material as "*any* communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind." Pet. App. 65a (quoting 47 U.S.C. 231(e)(6)) (emphasis added). But considering a particular picture or communication "as a whole" is fully consistent with examining it in the context in which it is presented, rather than in isolation. Indeed, the harmful-to-minors laws on which COPA was modeled described harmful material as "*any* description or representation" that is harmful to minors, *Ginsberg*, 390 U.S. at 646 (emphasis added); *American Booksellers*, 372 S.E.2d at 621 (emphasis added), and one of the obscenity statutes examined in *Roth* referred to "*any* obscene or indecent writing, * * * picture or print," 354 U.S. at 479-480 n.3

(emphasis added). Just as particular pictures and descriptions were to be considered in context under those statutes, they are to be so considered under COPA.

Furthermore, the Court has not hesitated to interpret federal statutes to embody constitutionally required standards even when those standards do not emerge from the most natural reading of the statutory text and, indeed, even when the standards are not set forth in the text at all. In *Hamling* v. *United States*, 418 U.S. 87, 114-115 (1974), the Court interpreted the federal obscenity statute to incorporate *Miller*'s constitutional requirements, even though the statutory text did not incorporate those requirements. The Court applied the principle that federal statutes should be interpreted to incorporate constitutional requirements so long as such a reading is not plainly contrary to the intent of Congress. *Id.* at 113. Accord *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994). Thus, even if COPA's "in context" requirement did not emerge so clearly from COPA's "as a whole" text, *Hamling* would compel adoption of that interpretation.

2. Here, as in other settings, there is no universal rule for applying the "in context" requirement. In general, however, individual pictures or articles should be examined in the context of an entire Web site. Many Web sites may be analogized to magazine, and, under this Court's decisions, individual pictures or articles in magazines are ordinarily examined in the context of the entire magazine. *Manual Enters., Inc.* v. *Day*, 370 U.S. 478, 489 (1962); *Ginzburg* v. *United States*, 383 U.S. 463, 466 n.5 (1966). That approach is also consistent with the principle that federal statutes should be interpreted to avoid constitutional difficulties. Thus, if an explicit work of art appears on a Web site devoted to serious

art, the explicit work of art should be evaluated in the context of the entire Web site.

That does not mean that a pornographer may escape his COPA obligations by inserting quotations from Voltaire onto a Web site that is devoted to pornographic depictions. The quotations, in that setting, would not provide relevant context—or would not redeem the character of the Web site—any more than such quotations would do so for a book or magazine devoted to obscenity. *Kois*, 408 U.S. at 231 ("A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication."). Similarly, if a Web site that contains a variety of material invites persons to "click for xxx pictures" and persons who click are diverted to a portion of the Web site that contains pornographic material, that highlighting feature would be an important part of the context in which the pornographic material was presented. There may also be other circumstances where the actions of the business displaying the communications has a distinct bearing on the context in which the material is displayed. That approach fully satisfies constitutional narrow tailoring requirements.

B. COPA Excludes Material That Has Serious Value For The Oldest Minors

The court of appeals also held that COPA is not narrowly tailored based on its view that Web businesses cannot know which minors should be considered in deciding whether material lacks serious value for minors. Pet. App. 24a. That criticism is misguided. Material is not covered by COPA unless it lacks serious value for all protected age groups, including the oldest

group of minors. Thus, material that has serious value for normal 16-year-olds is not covered by COPA.[3]

The background and text of COPA compel that interpretation. Before COPA was enacted, courts had interpreted state display laws to incorporate an older-minor standard. In *American Booksellers Ass'n*, 372 S.E.2d at 624, at the urging of Virginia's Attorney General, the Virginia Supreme Court held that material has serious value for minors and therefore is not subject to the State's display law if it has serious value for a "legitimate minority of normal, older adolescents." The court explained that "if a work is found to have a serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole." *Ibid.* In *Davis-Kidd*, the Tennessee Supreme Court held that material has serious value for minors within the meaning of that State's display law if it has serious value for "a reasonable seventeen year old minor." 866 S.W.2d at 533. In *Webb*, the Eleventh Circuit interpreted Georgia's display law in the same way. 919 F.2d at 1504-1505.

Against that background, Congress adopted language that mirrors the language of the state display laws. That choice of language was not accidental. In order to make sure that its standard was sufficiently precise and administrable, Congress deliberately borrowed the "familiar" definition of "harmful to minors" as that standard had been applied in the context of state display laws "over the years." H.R. Rep. No. 775, *supra*, at 13 (citing cases). Because Congress modeled COPA on the state display laws and deliberately incorporated

[3] That older minor standard also applies to COPA's prurient interest and patent offensiveness inquiries.

their harmful to minors definitions, COPA should be construed to incorporate the older minor standard reflected in those state display laws. *Evans* v. *United States*, 504 U.S. 255, 259-260 & n.3 (1992). That interpretation is also supported by the principle that federal statutes should be interpreted to avoid constitutional questions, rather than to create them. *X-Citement Video, Inc.*, 513 U.S. at 78.

The court of appeals concluded that COPA cannot be construed to incorporate an older-minor standard because COPA defines minor as "any person under 17 years of age." 47 U.S.C. 231(e)(7). But the state display laws cited above had similar definitions. *American Booksellers*, 372 S.E.2d at 621; *Davis-Kidd*, 866 S.W.2d at 534; *Webb*, 919 F.2d at 1513. COPA's definition of minors therefore provides no basis for departing from the settled understanding that material lacks serious value for minors as a class only when it lacks serious value for all protected age groups, including the oldest protected group.

The court of appeals also believed that an older minor standard is inconsistent with Congress's intent to protect younger minors from harmful material. Pet. App. 25a. There is, however, no inconsistency. Just as the obscenity component of COPA protects younger minors from the harmful effects of pornography that lacks serious value even for adults, the harmful-to-minors component of COPA protects younger minors from the harmful effects of pornography that lacks serious value for the oldest minors. In that way, COPA shields *all* minors from the most harmful material on the Web, without interfering with the interest of older minors in obtaining access to material that has serious value for them. In that respect as in others, COPA operates in the same way as state display laws: both

protect all minors from the harmful effects of pornography that lacks serious value for older minors.

The court of appeals also stated that, even if COPA incorporates an older-minor standard, "the term 'minors' would not be tailored narrowly enough to satisfy strict scrutiny." Pet. App. 27a. However, COPA's standard cannot be tailored further without eviscerating its protections for minors. Not surprisingly, the court of appeals expressly refused to "suggest how Congress could have tailored its statute" in any other way. *Ibid.*[4]

C. The Commercial Purposes Limitation Is Narrowly Tailored

COPA's commercial purposes definition limits COPA's obligations to persons "engaged in the business" of distributing harmful-to-minors material. 47 U.S.C. 231(e)(2)(A). Persons are "engaged in the business" only if they seek to profit from such material, and even businesses that seek to profit from harmful material are not covered unless they do so as "a regular course" of their business. 47 U.S.C. 231(e)(2)(B).

Those limitations are significant. Unlike the CDA, COPA excludes from coverage individuals posting messages on their own computers. It also excludes businesses that only occasionally provide harmful material. COPA thus narrowly limits its obligations to businesses that regularly seek to profit from harmful material. Such entities can legitimately be expected to

[4] The court of appeals also concluded that COPA's definition of "minor" is "impermissibly vague" because it forces Web publishers to "guess at the bottom end of the range of ages to which the statute applies." Pet. App, 55a-56a n.37. Interpreting COPA to incorporate an older-minor standard eliminates that vagueness concern.

absorb the costs of ensuring that their communications do not harm minors.

The court of appeals viewed the commercial purposes limitation as insufficient because Web businesses are covered even when they seek to profit through sales of "advertising space" rather than the sale of harmful material itself, and even when they do not post harmful material as a "principal part" of their business. Pet. App. 29a. Congress was not required to limit the Act's protections in the manner suggested by the court of appeals.

Congress had ample justification for extending COPA's obligations to businesses that seek to profit from harmful material by selling advertising space. Congress's authority to regulate effectively should not depend on a commercial pornographer's business model. A common method of doing business on the Web is to charge for advertising, and some commercial pornographers generate revenue in precisely that way. *Youth, Pornography, and the Internet*, *supra*, at 73, 75, 76. When such businesses post harmful material as a regular course of their business, they pose just as much of a threat to minors as businesses that post harmful material in order to sell it to consumers. Under the court of appeals' proposal, Web businesses that post nothing but pornographic pictures and advertising on their sites would be exempt as long as they seek to profit from advertising revenue rather than through sale of the pictures. Congress was not required so seriously to compromise its goal of protecting minors from harmful material.

Another significant loophole would have been created had Congress limited COPA's scope to businesses that post harmful material as a principal part of their business. Under that approach, Web businesses that ex-

pressly market themselves as pornography vendors would be exempt from the reach of the law, as long as they carefully limit the amount of harmful material on their Web sites to just under the amount necessary to make it the "principal part" of their business. COPA's commercial purposes definition closes that loophole and ensures that minors receive the protection they need. COPA's definition also avoids the significant practical difficulty that would arise from any attempt to define and calculate whether a Web business has posted harmful material as a "principal part" of its business.

The court of appeals expressed concern that, without such a limitation, COPA would impose obligations on Web businesses that are primarily devoted to the distribution of material that has serious value for minors, but that regularly include a single column that is harmful to minors. The court gave as an example a hypothetical Web site that deals primarily with medical information but also regularly publishes a bi-weekly column devoted to sexual matters.

The courts's concern is unfounded. A serious column on sexual matters on a medical Web site would not be harmful to minors, particularly in the context of that Web site. On the other hand, should a Web business that is primarily devoted to providing medical information display a bi-weekly column of sexually explicit pornography that is harmful to minors even when viewed in the context of a medical Web site, and should that Web business seek to profit from that regular pornographic display, there is no reason that it should be exempt from COPA's requirements. At that point, that Web business may reasonably be required to place that one bi-weekly pornographic column behind an age verification screen, leaving the rest of the site open for public viewing.

D. COPA's Affirmative Defenses Are Narrowly Tailored

COPA provides "an affirmative defense to prosecution" for businesses that restrict access by minors to harmful material by requiring use of a credit card or an adult ID. 47 U.S.C. 231(c)(1). That defense allows adults to obtain access to material that they have a constitutional right to receive, while protecting minors from material that is harmful to them. The court of appeals held that COPA's affirmative defenses are not narrowly tailored, reasoning that "COPA will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial." Pet. App. 35a. That analysis is seriously flawed.

1. The record in this case demonstrates that requiring an adult to present an adult ID or a valid credit card number is not an unreasonable burden. At the time of trial, approximately three million people possessed a valid Adult Check ID, Pet. App. 142a, and many commercial Web sites, such as Amazon.com, require a credit card to make a purchase, *id.* at 136a. Moreover, many popular Web sites require users to provide identifying information. The *Wall Street Journal* requires a paid subscription, J.A. 73, 580, eBay requires street address and phone number, J.A. 297, 581, and respondent Salon.com requires registration to obtain access to certain areas of its site. J.A. 77. If people are willing to use credit cards or adult IDs and provide identifying information for their own purposes, they reasonably can be called upon to do the same under procedures that are required to achieve the

compelling interest in protecting minors from harmful material.

Providing proof of age is also common in other contexts in which there is an interest in protecting minors. Proof of age is often a prerequisite for entry to a nightclub, an adult book store, or an NC-17 movie. See *Reno* v. *ACLU*, 521 U.S. at 890 (O'Connor, J., concurring in part and dissenting in part) (noting that the adult verification requirement is "much like a bouncer [who] checks a person's driver's license before admitting him to a nightclub").

Furthermore, COPA requires Web businesses to maintain the confidentiality of information collected for screening purposes. 47 U.S.C. 231(d)(1). The court of appeals viewed that important protection as inadequate because it believed that there are no penalties for violating the requirement of confidentiality. In fact, however, a violation of that requirement is punishable by a fine of up to $10,000 or imprisonment for up to one year. 47 U.S.C. 501.

2. The court of appeals not only overstated COPA's burdens; it also mistakenly viewed any burden on adult access to constitutionally protected material as a per se violation of the First Amendment. In order to further the compelling interest in protecting minors from harmful material, the First Amendment permits reasonable burdens to be imposed on adult access to such material.

This Court's decision in *Ginsberg* is instructive. In that case, the Court upheld a requirement that store owners make a good faith effort to ascertain the age of a customer purchasing harmful material. 390 U.S. at 643-644. In order to fulfill that obligation, stores owners would have to ask some youthful-looking adults for proof of age, even though making that request

would deter some adults from purchasing the material. The Court also upheld a requirement that a store owner must, in certain circumstances, make efforts to ascertain whether material is harmful to minors. *Ibid.* Faced with that concern, some store owners might choose not to sell items that have not been reviewed or cease selling publications that require such a review.

The decisions upholding state harmful-to-minor laws also rest on the principle that the First Amendment permits the government to impose reasonable conditions on adult access to harmful material in order to shield minors from that material. All of those laws impose burdens that may deter some adults from seeking access to harmful material or deter some businesses from providing it. Some adults may be unwilling to purchase harmful material when unsupervised vending machines are unavailable. Some adults may steer clear of blinder racks for fear of public embarrassment. Others may be disinclined to purchase magazines in sealed opaque wrappers because they cannot peruse them first. Still others may not purchase harmful material because they are unwilling to provide proof of age. Faced with the costs of compliance and a possible loss in sales, some stores may decide not to carry harmful material. Others may pass on to their customers the costs of establishing and maintaining a system that prevents minors from obtaining access to such material. Just as those burdens do not invalidate state display laws, the modest burdens associated with COPA fall well within constitutional limits.

This Court's recent decision in *United States* v. *American Library Ass'n*, 123 S. Ct. 2297 (2003), also shows that the First Amendment permits reasonable conditions to be imposed on adults in order to further the compelling interest in protecting minors. In that

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case, the Court upheld the constitutionality of the Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, § 1(a)(4), 114 Stat. 2763A-335, which conditions federal Internet assistance to public libraries on the libraries' use of filtering software that blocks access to obscenity, child pornography, and material that is harmful to minors. The Court rejected the district court's conclusion that CIPA violates the First Amendment because it requires adults to ask library personnel to unblock certain Web sites and adults may be too embarrassed to make such a request. A plurality of the Court stated that "the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment." 123 S. Ct. at 2307. Justices Kennedy and Breyer similarly concluded that placing a burden on adults to request access to blocked sites does not violate the First Amendment. *Id.* at 2309 (Kennedy, J., concurring in the judgment); *id.* at 2312 (Breyer, J., concurring in the judgment). Under COPA, moreover, there is no need to identify one's self in person.

Thus, requiring adults seeking pornographic material to present a valid credit card or an adult ID is a constitutionally permissible way to further the government's compelling interest in protecting minors from pornography. The harmful-to-minors material covered by COPA is not constitutionally protected for minors, even though it may be for adults. Requiring a credit card or adult ID as condition of access is a readily available and familiar mechanism for distinguishing the former from the latter.

3. Nor does it matter that a Web business's use of a screening device is an affirmative defense to prosecution, rather than an "assurance[] of freedom from prosecution." Pet. App. 36a-37a. In the present context, there is no constitutional difference between the two. Prosecutors can readily determine whether Web businesses are using credit cards or adult IDs as screening devices, and prosecutors who know that a person has a valid defense will not bring criminal charges. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (there is presumption that prosecutors will properly discharge their duties). Businesses that comply with COPA's defenses therefore have no legitimate reason to fear prosecution.

E. There Is No Alternative To COPA That Is Equally Effective

1. The court of appeals also erred in invalidating COPA on the ground that blocking software "may be at least as successful as COPA would be in restricting minors' access to harmful material online." Pet. App. 40a-41a. As applied to commercial Web sites in the United States that display harmful material as a regular course of their businesses, COPA's screening requirement is far more effective. COPA *compels* Web businesses to take steps to prevent minors from obtaining access to material that is harmful to them. Under the court of appeals' alternative, no entity is required to install filtering software. Blocking software also blocks access to some sites that contain no harmful material, and it permits access to some sites that contain such material. *Id.* at 148a, 160a. Minors with sufficient computer skills can defeat the blocking device. *Id.* at 148a. A minor's access is not restricted on a computer that lacks blocking software, such as a friend's computer. *Ibid.* Software can be expensive or burdensome for parents to purchase. H.R. Rep. No. 775, *supra*, at 19. And software must be updated periodically at an additional cost. *Id.* at 20.

Because of the deficiencies in blocking software, the court of appeals' reliance on this Court's decision in *Playboy* was misplaced. See Pet. App. 42a-43a. There, the less restrictive alternative identified by the Court *required* cable operators to block undesired channels upon the request of the subscriber, *at no cost* to the subscriber. 529 U.S. at 809-810, 816. Moreover, once the operator blocked the channel, it would eliminate *entirely* the problem of signal bleed *without affecting content on other channels*. By contrast, the court of appeals' blocking alternative is voluntary, it does not eliminate all harmful material, it has the effect of blocking material that is not harmful, and it imposes significant costs and burdens on parents. In addition, in *Playboy*, the Court viewed the alternative it identified as sufficient in large part because the government had failed to demonstrate that "signal bleed" was a serious or pervasive problem. *Id.* at 819-821. In contrast, Congress enacted COPA because it determined that pornography is widely available on the Web and that minors can easily obtain access to it. 47 U.S.C. 231 note (Finding 1). And in *Playboy*, the law at issue would have resulted in a ban of 30-50% of adult viewing of constitutionally protected adult material. 529 U.S. at 812. In contrast, COPA results in no such ban.

2. As the district court found, COPA's screening requirement will not protect minors from all sources of harmful material. It does not apply to non-Web protocols on the Internet and non-commercial Web sites, and its application to foreign Web sites is problematic. Pet. App. 39a. Congress reasonably concluded, however, that domestic commercial Web businesses display a large quantity of material that is harmful to minors. H.R. Rep. No. 775, *supra*, at 7. Congress was entitled to address that serious problem caused by persons in

this country, and to do so with the most effective means available. The district court found that some minors may obtain access to credit cards and adult IDs, Pet. App. 39a, but there is no evidence that a substantial number of minors possess such cards or that the ones who do are free to use them without adult supervision. Thus, while COPA's reliance on credit cards and adult IDs is not a perfect solution, it is far more effective with respect to domestic commercial Web sites than blocking software.

Congress also did not ignore the dangers posed by other sources of harmful material. As to those sources, it concluded that blocking software constitutes the most practical solution currently available. The reason is that non-Web protocols lack the technology for age screening; enforcement of a screening requirement against foreign Web sites would create serious enforcement difficulties; and *Reno* v. *ACLU*, 521 U.S. at 876-877, raised questions about the constitutionality of imposing compliance costs on non-commercial Web sites. In contrast, despite its limitations, blocking software can be used to address each of those sources of harmful material to some extent. For that reason, in a separate provision in COPA, Congress directed Internet service providers to notify customers of the availability of blocking software. 47 U.S.C. 230(d).

COPA's screening requirement and the use of blocking software by parents are thus not mutually exclusive alternatives. Rather, Congress envisioned that they would work together to prevent minors from being exposed to harmful material. COPA's screening requirement applies where it is far more effective, and blocking software is available to limit the sources of harmful material that COPA's screening requirement cannot. In these circumstances, any debate about

which is more effective operating alone is beside the point. The relevant question is whether Congress's entire scheme—which consists of COPA's screening requirement *and* the notification of customers of the availability of blocking software—is significantly more effective in preventing access to harmful material than blocking software alone. Because the two together are significantly more effective in protecting minors from harmful material than blocking software alone, the court of appeals' blocking-only alternative is not nearly as effective as the scheme that Congress enacted.

III. COPA IS NOT SUBSTANTIALLY OVERBROAD

The court of appeals further erred in holding that COPA is substantially overbroad. In reaching that conclusion, the court relied on the same considerations that led it to conclude that COPA is not narrowly tailored—that COPA does not require material to be viewed in context, that COPA does not have an older minor standard, that COPA's commercial purposes limitation is not narrow enough, and that the affirmative defenses result in an unacceptable burden on adults. Pet. App. 51a-57a. As previously discussed, the court erred in finding COPA not narrowly tailored on those grounds. For the same reasons, it erred in finding COPA substantially overbroad on those grounds.

The court also concluded that COPA's reliance on community standards "exacerbates" COPA's substantial overbreadth. Pet. App. 58a. Because the features of COPA on which the court relied in its narrow-tailoring analysis are not "constitutional problems" to begin with, *ibid*, COPA's reliance on community standards cannot exacerbate any such problems. And, as this Court held in *Ashcroft* v. *ACLU*, 535 U.S. at 585, "COPA's reliance on community standards

to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." Moreover, Congress determined when it enacted COPA that community standards concerning what is "prurient" and "patently offensive with respect to minors are likely to be "reasonably constant" throughout the United States. H.R. Rep. No. 775, *supra*, at 28. The court of appeals identified no evidence showing that judgment to be unreasonable, especially with respect to a nationwide medium like the Internet.

The court's overbreadth analysis is flawed for another reason. For a law to be unconstitutionally overbroad, its impermissible applications must be "'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia* v. *Hicks*, 123 S. Ct. 2191, 2197 (2003). Here, the court of appeals failed to establish that COPA's impermissible applications are substantial in an absolute sense, much less that they are substantial relative to COPA's many plainly legitimate applications.

Despite the numerous exhibits submitted by respondents and their amici in an effort to demonstrate that COPA has an unjustifiable scope, the court of appeals identified only three Web communications with serious value for adults that are even *arguably* covered by COPA. Pet. App. 52a-54a & n.35. The court's conclusion that those examples are arguably covered by COPA is premised on the court's view that COPA requires material to be viewed in isolation, rather than in context. *Id.* at 51a-52a. The court found that none of the examples are even arguably harmful to minors when viewed in context. *Id.* at 52a-54a & n.35. As previously discussed, material is covered by COPA only

if it is harmful to minors when viewed in context. Thus, the court of appeals held COPA substantially overbroad without identifying a single real life example of an invalid application. This Court's decisions do not permit that result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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